In the Supreme Court of the United States.

National Exchange Bank of Tiffin, Ohio,
Plaintiff in Error,
vs.
Solon L. Wiley,
Defendant in Error.
} No. 18,967.

In Error to the Supreme Court of the State of Nebraska.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

Constantine J. Smyth,
Thomas D. Crane,
J. J. Boucher,
Attorneys for Plaintiff in Error.

Defendant in error suggests that warrants of attorney are strictly construed.

This means no more than that they are strictly construed when judgment is sought according to their terms. But it has never been suggested that judgments entered upon such warrants are to be strictly construed, or construed differently from other judgments. We have seen that in the case of *Snyder v. Critchfield*, 44 Neb. 66, a judgment on a warrant of attorney was construed as are judgments in other

actions. Therein it is said: "A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on here, as a judgment on adversary proceedings."

> "In an action on such judgment, payment of the debt defore judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action cannot be availed of. The judgment itself is conclusive against such defenses."

The defendant cites the case of *Spence v. Emerine*, 46 O. S. 433, as "the leading case in Ohio involving a construction of warrants of attorney such as this." That case differs from the case at bar in many essential particulars. That was a direct attack on the judgment by proceedings in error while in the case at bar the attack on the judgment is collateral. In that case, as stated by that court, "the power of attorney attached to the note in controversy, does not, in express language authorize a confession of judgment in favor of anyone, not even the payee," while in the case at bar the power of attorney attached to the note authorizes judgment to be confessed in favor of "the holder of this instrument." In that case the record before the court disclosed that E. S. Clark was the payee named in the note while judgment was confessed in favor of Andrew Emerine to whom the note had been transferred by delivery, while in the case at bar the record discloses that this plaintiff in error, National Exchange Bank, was named as payee, the judgment was confessed in favor of the National Exchange Bank and the National Exchange Bank brought the action on the judgment in the Nebraska court. At no place

in the record of the Ohio court does it appear that any person or corporation other than the National Exchange Bank ever had any interest in either the note or judgment.

In that case the case of *Clements v. Hull*, 35 O. S. 141, is cited to the effect that where the warrant of attorney, as in the case at bar, authorizes a confession of judgment in favor of the holder of the note, judgment may be executed in favor of an equitable owner and holder to whom the note has been transferred by delivery.

It is apparent then that the case of *Spence vs. Emerine* is not an authority in favor of the position of defendant in error. There the court reversed the judgment of the lower court because it appeared on the face of the record that it was only by implication that it could be held that the maker of the warrant of attorney had authorized judgment to be confessed against him, even in favor of Clark, the payee of the note, while judgment was confessed in favor of one Emerine. to whom the note had been transferred by delivery. It is clear beyond controversy that if the record in that case had shown that judgment had been confessed in favor of the person designated, as in the case at bar, the judgment of the lower court would have been affirmed.

Defendant in error at pages 17-20 of his brief sets up some suppositious cases, differing from the case at bar as much as it is possible for cases to differ, and then because such cases warrant the conclusion reached by the Nebraska court concludes that the judgment of the Nebraska court was correct. He refuses to allow any force or effect whatsoever to the judgment of the

Ohio court. He treats every question as an open one, just as though the action in the Nebraska courts was one on the note instead of on the judgment entered on the note. He says—"Hence, if the plaintiff was not the holder of the note, the attorney was not Wiley's agent and could not give the court jurisdiction over him."

Plaintiff in error in its first brief has shown the fallacy of this contention, but a further consideration of the subject in this connection may not be without profit.

The validity or invalidity of the warrant of attorney was necessarily the first question to be considered by the Ohio court in the action on the note. If the warrant of attorney should prove to be invalid because of the signature thereto being a forgery, or for any other reason, then the defendant would not be in court; the court would have no jurisdiction over his person and consequently would not have jurisdiction to render judgment against him. And although the court should adjudge the warrant of attorney to be valid the defendant would not be estopped to assert the contrary in any proceeding, collateral or otherwise, and that consequently the judgment was void. This would be one of the two jurisdictional questions which may be enquired into at any stage of any proceeding, and any fact tending to show the invalidity of the warrant of attorney is always competent to be considered.

But the Ohio court adjudged the warrant of attorney to be valid, and its validity has been at all times conceded by the defendant. Consequently every jurisdictional question which can be enquired into in a collateral proceeding has been settled in favor of the judgment.

The validity of the warrant of attorney having been found by the Ohio court, and the defendant being before the court by attorney, the next question necessarily presented for the consideration of the court was whether or not the plaintiff was the holder of the note. If the plaintiff was found not to be the holder of the note, then the action should be dismissed, not because, as contended here by the defendant, the court did not have jurisdiction over the person of the defendant, but because the plaintiff was not the owner of the claim sued upon; was not the real party in interest; was not the person in whose favor judgment was authorized to be confessed.

If, however, the plaintiff was found to be the holder of the note then he was entitled to judgment against the defendant for the amount found to be due.

This was an allegation necessary for the plaintiff to make and prove, and a question necessary for the court to pass upon. This was no more of a jurisdictional question than was the question of the amount due from the defendant. The court did pass upon it and did decide that the plaintiff was the holder of the note and entered judgment accordingly. As we have seen, every authority is to the effect that such judgment is conclusive against collateral attack. That the court having jurisdiction over the person of the defendant its judgment on other matters, whether right or wrong, is conclusive.

The defendant suggests that it would be competent for him to show that a butcher for instance, and not an attorney at law, confessed judgment against him.

This is by no means conceded. In the case of

Teal v. Yost, 128 N. Y. 387, heretofore cited, it is said that "if it appears by the record that the defendant appeared by attorney the defendant may disprove the authority of such attorney to appear for him" by showing "that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon." Clearly, however, he would not be allowed to show in contradiction of the record that the person who exercised the power of attorney was not an attorney at law.

The defendant likewise suggests that if a power of attorney by A to sign his name to a note payable to C be executed by signing a note payable to D the maker is not liable. This may be true. But suppose on the other hand that the note is made payable to C in accordance with the power of attorney, and there is an adjudication by a court possessing jurisdiction over both the subject matter of the action, and the parties, as in the case at bar, to the effect that C is C, clearly the contrary cannot be shown in a collateral proceeding.

The defendant at page 200 of his brief says, that should the contention of the plaintiff herein be sustained, that then by fraudulent practices, successive judgments in favor of many different persons could be obtained on one instrument and that "the richest man to be found anywhere could be financially ruined by obtaining his name to a note like this."

The defendant is needlessly alarmed. "The richest man to be found aywhere" would have no difficulty in going into the courts, wherein such judgments had been rendered, and procuring them to be set aside. Judgments on warrants of attorney, like other judgments,

are subject to direct attack in the courts where rendered, and the books are full of cases where such judgments have been attacked in direct proceedings by appeal or error.

If there is any force to the defendant's suggestion there is nothing now to prevent the holder of such an instrument from himself obtaining such judgments in many different courts. That would not be more difficult, nor indeed so difficult, as for different persons to obtain such judgments. We well know that when a judgment is rendered upon an instrument, that that instrument is surrendered up and cancelled, and effectually put out of circulation. There is not an instance on record of the fraudulent practices suggested.

On pages 26 and 27 of his brief, the defendent reviews the case of *Simmons v. Saul.* 138 U. S. 439. Therein he says—"The court had jurisdiction over the thing. Thereupon, having acquired jurisdiction over the thing, its subsequent acts in disposing of it were at most quasi-jurisdictional. And such was the ground of the court's decision."

The identical contention of the plaintiff herein. The Ohio court having jurisdiction over the subject matter of the action and having acquired jurisdiction over the person of the defendant by virtue of a valid warrant of attorney, produced in court by the plaintiff, "its subsequent acts in disposing of it were at most quasi-jurisdictional."

The Defendant's Fourth Point.

At page 29 of the defendant's brief he says: "When the plaintiff offered the transcript of its judgment in evidence (Ex. 1) the defendant made the following

objection (p. 20): 'The defendant objects to the introduction of Exhibit 1, because Exhibit 1 is not responsive to the pleadings. The petition alleges a judgment against Wiley. Exhibit 1 purports to show a joint judgment against the Wiley Construction Company and S. L. Wiley. Such a judgment cannot be made the basis of a separate action against one of the named debtors.'"

This statement is erroneous. The petition alleged a recovery of a judgment against *Wiley and Wiley Construction Company*. (Record 3). The transcript of the judgment shows a judgment against *Wiley and Wiley Construction Company*. Hence the objection tnat "Exhibit 1 is not responsive to the pleadings" is not well taken.

The Defendant Waived Any Defect of Parties.

The defect of parties defendant, if such there was, appeared on the face of the petition. By failure to demur for that reason the defendant waived the defect. Such are all authorities.

> "The objection that there is a defect of parties (which is in effect a non-joinder of parties) must also be taken by demurrer at the proper time, when the deficiency appears upon the face of the record, or it will be waived. And the rule applies equally whether the defect is one of parties plaintiff or of parties defendant."
>
> *6 Encyc.* Pl. & Pr., 375.
>
> Citing, *Beeler v. Larned*, First Nat. Bank, 34 Neb., 348.

In that case it is said, "Objection is made that the action in form should have been against all the signers

of the note and not against one of them alone. This is true. An action upon a joint obligation under the Code should be brought against all the joint obligors. It is not necesessary as at common law, however, to obtain service upon all, but judgment may be rendered against such as can be served. The defect, however, appeared on the face of the petition, and a demurrer for a defect of parties defendant should have been interposed. As the plaintiff (defendant) failed to do this, the defect is waived."

In *Castile v. Ford*, 53 Neb., 507 it is said, "A defect of parties plaintiff, appearing on the face of the petition, must be objected to by demurrer on that ground, or it will be waived."

In any event the defendant is not in position to urge this point. The trial court ruled against the contention.

By not assigning the ruling as error he must be deemed to have acquiesced in it. True he urged the contention in argument in the Nebraska Supreme Court, but that court ignored it. It would, indeed, be a startling proposition that a judgment of a trial court should be affirmed, because perchance in the course of the trial that court erred in a ruling on a point of practice.

Respectfully submitted,

CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiff in Error.

Omaha, Neb., October 4, 1904.